United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1909.

No 1985. 625

No. 9, SPECIAL CALENDAR.

HORACE M. CAKE, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 30, 1909.

Court of Appeals, District of Columbia

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No 1985.

No. 9, SPECIAL CALENDAR.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1909.

In the Court of Appeals of the District of Columbia.

No. 1985.

HORACE M. CAKE, Plaintiff in Error,
vs.
DISTRICT OF COLUMBIA.

a No. 331,240.

In the Police Court of the District of Columbia, December Term, 1908.

DISTRICT OF COLUMBIA
vs.
HORACE M. CAKE.

Information for Violation of Liquor Law.

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 (*Information.*)

Filed Dec. 22, 1908. F. A. Sebring, Clerk Police Court, D. C.

In the Police Court of the District of Columbia, December Term, A. D. 1908.

DISTRICT OF COLUMBIA, *ss:*

James L. Pugh, Jr., Esq., Assistant Corporation Counsel, who for the said District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that Horace M. Cake, late of the District of Columbia aforesaid, is the keeper of a licensed bar-room or place where intoxicating liquors are sold, under the provisions of an Act of Congress entitled "An Act regulating the sale of intoxicating liquors in the District of Columbia," approved March 3, 1893, on the 20th day of December, in the year one thousand nine hundred and eight, on "I" street, Northwest, in the City of Washington, District of Co-

lumbia aforesaid, did then and there keep and have said place for the sale of, and did sell intoxicating liquors on said day, the said day being Sunday, contrary to and in violation of an Act of Congress entitled "An Act regulating the sale of intoxicating liquors in the District of Columbia," approved March 3, 1893, and constituting a law of the District of Columbia.

(Signed) JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared M. L. Howes this 22nd day of December, A. D. 1908, and made oath before me that the facts set forth in the foregoing information are true.

(Signed) N. C. HARPER,
Deputy Clerk Police Court
of the District of Columbia.

[Seal Police Court of District of Columbia.]

True Copy,
Attest:
N. C. HARPER,
Deputy Clerk Police Court, D. C.

2 *Bill of Exceptions.*

Filed Jan. 16, 1909. F. A. Sebring, Clerk Police Court, D. C.

Be it remembered that at the hearing of this cause in the Police Court of the District of Columbia on the 6th day of January, 1909, before the Hon. George C. Aukam, one of the Judges of said Court, the prosecution to maintain the issues on its part joined called as a witness M. L. HOWES who testified on direct examination that he was a member of the Metropolitan Police Force of the District of Columbia, that on Sunday, December 20th, 1908, about 1.30 P. M., accompanied by one T. A. McCowry, he entered the cafe of the Normandie Hotel, 15th and I Streets, N. W., Washington, D. C., and sat down at a table and ordered a drink, whereupon the waiter informed them that the drinks were served on Sunday only to *bona fide* registered guests at their meals or in their rooms; that the register was brought down to them from the hotel office which was up stairs; that they thereupon registered in the hotel register and each ordered a cheese sandwich and a bottle of beer; that they were served with this order and upon consuming it they each ordered a high ball which was served them; that they thereupon paid their bill and departed. Upon cross examination witness testified that the cafe in which they sat fronted on I Street and 15th Street and that on the door was painted, "Ladies' and Gentlemen's Cafe;" that the room contained about fifteen or twenty tables with seating capacity varying from two to four people; that it had all the appointments of an ordinary hotel dining room; that they entered about 1.30 P. M. and were the only patrons in the dining
3 room; that when they sat down they were approached by a waiter from whom they ordered a drink; that this waiter

called the head waiter who informed them that the orders of the management permitted drinks to be served on Sunday only to *bona fide* registered guests with their meals or in their rooms; that the hotel register was then brought down to them from the hotel office up stairs and they thereupon registered in it; that he registered as "M. L. Howes, Cleveland, Ohio," that a bill of fare was thereupon handed to them and they each ordered a cheese sandwich and a bottle of beer; that the waiter thereupon wrote the order on a check in his order book and left the room; that it was between eight and ten minutes before he returned with the sandwiches and beer; that during his absence they were served with water, plates, knives and forks, etc., that salt and pepper, etc., were already on the table; that they ate the sandwiches, which were regular hotel *a la carte* sandwiches, fresh and wholesome, and drank the beer; that they then ordered a high ball each, which was served them by the same waiter; that a check for 90 cents, thirty cents of which was for sandwiches, was presented to them; that they paid it and went out. Witness was shown the hotel register which he identified as the one he signed and also his signature, "M. L. Howes, Cleveland, Ohio," thereon; witness was also shown a bill of fare which he identified as similar to the one from which he ordered.

Whereupon the prosecution to further maintain the issues upon its part joined called as a witness T. A. McCowry, who testified that on the Sunday in question he went to the Hotel Normandie with the witness Howes who had just testified, and the witness thereupon gave testimony both on direct and cross examination substantially the same as that of the witness Howes detailed above.

4 Whereupon the prosecution rested.

Whereupon the defendant through his attorney moved the Court to quash the information and dismiss the defendant as a matter of law on the grounds that the testimony showed that the defendant was the keeper of a hotel and thereby privileged to sell liquor on Sundays to *bona fide* registered guests at their meals or in thier rooms and that the testimony further showed the witnesses Howes and McCowry to be such. But the presiding Judge overruled said motion; whereupon the defendant asked an exception on the grounds stated above, which was duly granted and noted, and the defendant thereupon gave notice of his intention to apply to the Court of Appeals for a writ of error.

Whereupon the defendant to maintain the issues upon his part joined called as a witness P. H. S. Cake, who testified that he was the manager of the Normandie Hotel for his brother Horace M. Cake, defendant herein, that the hotel was conducted on the American and European plans; that it had two dining rooms, one for the American plan guests, and the other, the one in which the witnesses Howes and McCowry were served, for the European guests; that he had issued printed instructions to all his employees, among which were instructions to the waiters and bar tenders that no drinks were

to be served on Sunday except to *bona fide* registered guests at their meals or in their rooms; that the guests of the hotel on the European plan used the European dining room for their meals; that there were no more guests there on Sunday than on any other day during the week; that he considered anyone a *bona fide* guest who ordered from the hotel bill of fare the same eatables on Sunday which were customary to be ordered by guests during the week; that he had instructed his employees that this was to be their standard in judging; that when an order was given in the cafe the waiter wrote it in his order book and took it back to the kitchen, where one of the cooks prepared the food according to the order; that it took between five and ten minutes to take an order for a cheese sandwich, have it prepared in the kitchen and serve it in the cafe; that no sandwiches were ready prepared but that all were made up as ordered; witness then identified as the hotel register the one previously identified by the witnesses Howes and McCowry as having been signed by them; witness further identified as the regular bill of fare of the cafe the one previously identified by the said witnesses as the one from which they ordered and witness thereupon pointed out upon said bill of fare under the head of "Sandwiches," the item "Cheese, 15 cts."

Witness was not cross-examined.

Whereupon to further maintain the issues upon his part joined the defendant produced as a witness COSBY F. WASHINGTON, who testified that he was the head waiter having charge of the European dining room in the Normandie Hotel; that he was in said dining room in the discharge of his duties about 1.30, Sunday, Dec. 20, 1908, when the witness Howes and McCowry entered. That a waiter named Fraction approached them and that they ordered two bottles of beer; that the waiter Fraction called him and told him of their order and he thereupon informed them that the hotel served drinks only to *bona fide* registered guests at their meals; that he then brought the hotel register down from the hotel office up stairs and they thereupon registered, whereupon said Fraction handed them the regular cafe bil- of fare from which they each ordered a chees- sandwich and a bottle of beer; that said Fraction wrote their order in his order book and took it back to the kitchen where the sandwiches were prepared and returned to the cafe with the sandwiches and beer which he had obtained in the bar; that all this consumed about eight or ten minutes; that Howes and McCowry each thereafter ordered a high ball which was served to them; that they thereupon paid their bill of 90 cts. and departed; that he is in the dining room during the week; that this order would be served in precisely the same manner during the week except that the guests would not have to register; that this order went through the same routine as it would have done had they ordered an elaborate meal; that all the European plan guests of the hotel ate in this dining room on Sundays as well as week days; that people frequently came in on week days between 12 and 2.30 and ordered a sandwich of some kind, often cheese, and something to drink for

their lunch; that there are no more sandwiches sold in the cafe on Sunday than on any other day; that all sandwiches are ordered from the bill of fare and each order prepared separately as it is received in the kitchen.

Witness was not cross-examined.

Whereupon to further maintain the issues upon his part joined the defendant called as a witness JAMES FRACTION, who testified that he was employed as a waiter in the European dining room of the Normandie Hotel and that he served the witnesses Howes and McCowry; that they first ordered two bottles of beer, whereupon he called the head waiter, Washington, according to his instructions; that the head waiter informed them that they served drinks
7 on Sunday only to *bona fide* registered guests at their meals or in their rooms; that the head waiter thereupon brought down the hotel register from the hotel office upstairs and they thereupon registered; whereupon he handed them the regular cafe bill of fare from which they each ordered a cheese sandwich and a bottle of beer; that he wrote their order in his order book and took it to the kitchen where he gave the order to the chef; that the chef then and there in his presence prepared two cheese sandwiches; that he then obtained two bottles of beer in the bar which he served with the sandwiches in the cafe; that this took between five and ten minutes; that witnesses Howes and McCowry ate the sandwiches and drank the beer after which they ordered two high balls, which were served to them; that their bill for 90 cts. was thereupon presented to them; that they paid it and went out; that he works in this cafe during the week; that the European guests eat there; that every day during the week guests order sandwiches and drinks for lunch; that he does not serve any more sandwiches on Sunday than on week days and that all orders are prepared specially in the kitchen from the order book; that this order went through the same procedure as one for an elaborate dinner would have done and that the witnesses Howes and McCowry were served as guests the same as they would have been on week days with the exception that they registered. Witness then identified in the register the signatures of the witnesses Howes and McCowry; witness then identified the bill of fare previously identified as the one from which Howes and McCowry ordered; whereupon defendant offered said register and bill of fare in evidence and they were duly admitted in evidence. Witness was not cross examined.

Whereupon to further maintain the issues upon his part
8 joined Defendant called as a witness the chef, LOUIS ZEREGA, who testified that he was the chef of the Normandie Hotel and had charge of the kitchen; that all orders for food were brought to the kitchen by waiters on order slips; that the food was then prepared according to such orders; that he prepared the sandwiches in question and that it took between three and four minutes; that they kept no sandwiches ready prepared on Sunday or any other day; that a good many sandwiches are ordered every day about lunch time; that no more are ordered on Sundays than on week days.

Witness was not cross-examined.

The foregoing is the substance of all the testimony offered in this case.

And thereupon, the defendant having rested and the prosecution not having produced any evidence in rebuttal, defendant, through his attorney, moved the Court to render a verdict of "Not Guilty" as a matter of law on the grounds that the testimony showed the witnesses Howes and McCowry to be registered *bona fide* guests of the Normandie Hotel on the 20th day of December, 1908, and as such they were served with liquors at their meals and that therefore the defendant had not violated the excise law of the District of Columbia as charged in the information. Whereupon the judge took the matter under advisement and on January 15th, 1909, overruled said motion by rendering a decision of guilty and sentencing the defendant to pay a fine of Fifty Dollars; whereupon defendant then and there excepted, which was granted, and gave notice of his intention to apply to the Court of Appeals for a writ of error; and said exception was duly noted.

9 Whereupon on the 18th day of January, 1909, defendant, through his attorney, submitted this bill of exceptions to the Court and prayed that the Court should sign seal and make these a part of the record, to have the same force and effect as if each of said exceptions were severally set forth in a separate bill of exceptions; and the same was accordingly done, and the Court signs and seals this bill of exceptions and makes the same a part of the record to have the same effect aforesaid, *nunc pro tunc,* this 18th day of January, 1909.

(Signed) GEORGE C. AUKAM, [SEAL.]
Acting Judge, Police Court, D. C.

10 (*Copy of Docket Entries.*)

No. 331,240.

In the Police Court of the District of Columbia.

December Term, A. D. 1908.

DISTRICT OF COLUMBIA
vs.
HORACE M. CAKE.

Information for Violation of Liquor Law.

Defendant arraigned January 6, 1909. Plea: Not guilty. Exceptions taken to the rulings of the Court on matters of law and notice given by defendant in open Court at the time of the several rulings of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

Continued to January 16, 1909.

January 12, 1909.—Motion for a new trial filed.

January 15, 1909.—Motion for new trial argued and overruled.

January 16, 1909.—Judgment: Guilty. Sentence: To pay a fine of fifty dollars, and, in default, to be committed to the Workhouse for the term of thirty days.

Bill of exceptions filed.

Recognizance in the sum of $100 entered into on writ of error to the Court of Appeals of the District of Columbia, upon the condition that in the event of the denial of the application for a writ of error, the defendant will, within five days next after the expiration of ten days, appear in the Police Court and abide by and perform its judgment, and that in the event of the granting of such writ of error the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises. William W. Stewart, surety.

January 18, 1909.—Bill of exceptions settled, signed and sealed.

January 23, 1909.—Writ of error received from the Court of Appeals of the District of Columbia.

11 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, N. C. Harper, Deputy Clerk of the Police Court of the District of Columbia, acting in the absence of the Clerk, do hereby certify that the foregoing pages, numbered from 1 to 10 inclusive, to be true copies of originals in cause No. 331240, wherein the District of Columbia is plaintiff and Horace M. Cake defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, the City of Washington, in said District, this 30th day January, A. D. 1909.

[Seal Police Court of District of Columbia.]

N. C. HARPER,
Deputy Clerk Police Court, Dist. of Columbia.

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable George C. Aukam, Acting Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, plaintiff, and Horace M. Cake, defendant, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals

of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 23d day of January, in the year of our Lord one thousand nine hundred and nine.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Endorsed on cover: District of Columbia police court. No. 1985. Horace M. Cake, plaintiff in error, *vs.* District of Columbia. Court of Appeals, District of Columbia. Filed Jan. 30, 1909. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1909.

No. 1985.

No. 9, SPECIAL CALENDAR.

HORACE M. CAKE, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

PETITION FOR REHEARING AND RECALL OF MANDATE.

WILLIAM C. PRENTISS,
Attorney for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1909.

No. 1985.

No. 9, SPECIAL CALENDAR.

HORACE M. CAKE, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

PETITION FOR REHEARING AND RECALL OF MANDATE.

The appellant's brief in this case was prepared hastily, with the expectation that the case would be argued orally and opportunity then had to more fully consider the case and reply to the argument of the appellee.

It is also proper to say that counsel were prepared to orally argue the case, and upon receiving information that the preceding case was unexpectedly about to close, hastened to the court and reached there just after the court had taken the case as submitted and adjourned for the day. It will be remembered that the argument in the preceding case

terminated just a few minutes before the close of the day, and counsel had had every assurance that it would continue into the next day.

We feel that the court has failed to appreciate the gravity of the case. The statute declares a forfeiture of the license upon two convictions, and this court has held that the holder of the license is liable though the violation of the law be by employees without the employer's knowledge or even contrary to his instructions.

It is common knowledge that a liquor license is in itself a valuable property, and that it is a necessary adjunct to a hotel dependent upon transient trade. Not only the innkeeper but the owner of the property is vitally dependent upon the continuance of the license. It is also common knowledge that if a license be declared forfeited it is almost impossible to secure the signatures of residents and owners of property in the neighborhood necessary to the granting of a new license.

Under such circumstances a conviction is a serious matter. The small fine imposed is of no consequence. The appeal in this case was taken not for the purpose of escaping the fine imposed or avoiding any discredit thereby cast upon the defendant, and not to make a test case. The amount of liquor sold to guests of the Normandie on Sunday always has been inconsiderable. The privilege of guests to be served with liquor with their meals on Sunday, however, must be regarded.

But a conviction is a grave matter, affecting the continuance of the license, and where, as has been held by this court, the holder of the license is liable for violation of the law by his employees, without his knowledge or even against his instructions, and, therefore, practically at their mercy, he cannot afford to have one conviction stand against him to develop into forfeiture of his license in case he become involved in a second prosecution through the misconduct of employees.

The positions taken by the court in its opinion are a surprise to counsel, and had they been anticipated would have been met in the main brief or in a reply brief.

It is most respectfully submitted that the court has indulged in unwarranted assumption. A reading of the opinion gives the impression that it is assumed that the defendant had attempted to evade the law and that the question before the court is whether his "device" can be judicially sustained. It seems to have been assumed that when the two policemen, strangers to the defendant, entered the café and gave the order for beer, the defendant's employees immediately co-operated with the strangers to evade or violate the law.

If the defendant was ready and willing to violate the law, why should not the order for beer have been filled? The two policemen were the only persons in the café, and if detection were the only concern, there was apparently no danger. Why resort to what this court assumes to have been a device? If the members of the court were cognizant of the methods of some hotels in the city of Washington, they would know that when the purpose to violate the law exists it is done directly, the only precaution being to exercise a degree of care as to who are admitted. The management of the Normandie, however, has always strictly complied with the law and in good faith served liquor on Sunday only to registered guests with their meals or in their rooms.

The apparent attitude of the court overlooks the fundamental principle of criminal law that the defendant is presumed to be innocent. The question is not, Is the conduct of the defendant consistent with guilt, but always, is his conduct consistent with innocence? Always guilt must be established beyond a reasonable doubt.

Citation of authority upon this point would be a reflection upon the court.

It is also most respectfully submitted that the court has also confused the application of the principles of burden of proof. This court has held that the information need not negative the exception in favor of innkeepers, but that the defendant must avail himself of the exception as a matter of defense. In the opinion complained of the court has gone further, and assumed that the burden of proof is absolutely shifted to the defendant, and that he must maintain it by a preponderance of evidence.

This court has frequently announced that in criminal cases upon every issue the burden is upon the plaintiff. Although it may be necessary for the defendant to develop his defense and offer evidence, yet the burden remains upon the plaintiff, and in criminal cases the burden upon the prosecution is to establish guilt beyond a reasonable doubt.

For a statement of the rule see 5 Enc., 2d ed., pp. 30 to 38.

The case of Lehman *vs.* D. C. goes only to the point that it is not incumbent on the prosecutor to anticipate the defense. (See p. 224, 19 App. D. C.)

The court in the opinion complained of apparently concedes that if the two policemen had first gone to the office and registered the defendant would have been entitled to serve them liquor with whatever food they might have ordered in the café, and that the question is always the good faith of the defendant. The question, then, is practically one of *scienter,* with every presumption in favor of the accused. If his conduct was consistent with good faith the prosecution should fail, especially where, as here, there is a total absence of evidence tending to establish *scienter,* guilty knowledge, or intent.

It is undoubted fact that the two policemen registered as guests, and that they ate a meal. Was there anything in their conduct which bound the defendant with notice that it would be a violation of the law to serve them with liquor at their meal? As said by Mr. Justice Holmes in Commonwealth *vs.* Regan, 182 Mass., 22, the question is to be deter-

mined by the external visible facts, and the substance of the ruling of the court in that case was that if one intends to buy food and eat it, it is immaterial that the motive of his intent may be the desire to drink liquor with it.

The defendant here was entitled to assume that the motives of the two strangers were honest. They entered the café at the ordinary lunch time, sat down and ordered beer. The waiter at once called the head waiter, who, naturally assuming that the strangers were ignorant of the prohibition in the liquor law, informed them that liquor was served only to *bona fide* registered guests with their meals or in their rooms. While an apparently immaterial point, it is worthy of note that the information given was technically correct—"*bona fide* registered guests." What other reply could properly have been made to the request to be served with beer? The information given was an exact statement of the law, and, without ignoring the presumption of innocence, cannot be twisted into an invitation or suggestion.

As noted by this court, there is a hiatus in the evidence as to what further conversation occurred. It cannot be assumed that no further conversation occurred, and if it be essential to the prosecution's case that, without further parley, the head waiter went for the register the burden was upon the prosecution to prove that fact. We read the opinion of the court as conceding, in effect, that if, when the head waiter gave the information referred to, the strangers had gone to the office and registered they would have been *bona fide* registered guests, but that as the head waiter brought the register down to them in the café the presumption of innocence was thereby completely rebutted and reasonable doubt eliminated.

The act of bringing the register down from the office, however, stands by itself unexplained by any evidence. The fair presumption is that the strangers asserted their desire to register and become guests. They had the right to do so, and, more, the innkeeper was under obligation to receive them.

There is no reason shown why he could or should have refused to receive them. The innkeeper is under obligation to receive all comers who, as is said in the books, are in fit condition. The fact that two strangers enter an inn and ask to be served with beer does not deprive them of their right to be received as guests. So far as the innkeeper is concerned, he must assume that their request to be served with beer was made in ignorance of the prohibition of the law. The effect of the decision complained of, as we read it, is to require the innkeeper in such a case to assume that the strangers knowingly and intentionally are soliciting him to violate the law. On the contrary he is entitled, and even bound, to assume that their motives are honest and innocent, and govern himself accordingly, under penalty of civil liability for breach of his duty as innkeeper to receive all comers.

It will not do to say that their request for beer was a reason, sufficient or otherwise, for refusing to receive them as guests and that the innkeeper for that reason should have refused to receive them. They were strangers and the innkeeper was under common law liability to receive all who chose to visit the house. Had he refused to receive them he would have incurred civil liability and a possible suit for damages.

To be sure, one of the maxims of the law is that every one is presumed to know the law, but, like every other sound principle, its application has limitations. It is applicable only where the person upon whom the implication falls is being held to responsibility. But it is contrary to all principles of law, especially of criminal law, with which we are here concerned, that when two strangers enter a hotel café on Sunday and ask to be served with beer, the innkeeper shall assume that they knowingly and intentionally are soliciting him to violate the law and that he must, in effect, eject them from his premises.

We therefore insist with all confidence and conviction that so far as the innkeeper was concerned, the request to be served with beer was no obstacle to the two strangers becoming *bona fide* guests, and, as we have suggested, we understand the position of the court to be that had they gone to the office and registered the innkeeper properly could have served them liquor with the food ordered by them. The point upon which the court hangs its ruling is the single fact that the head waiter brought the register down from the office. The ulterior motive found in this by the court rests purely upon assumption. The court attributes to an act, innocent in itself, an improper motive, when there is no evidence whatever tending to rebut the presumption of innocence.

There is no evidence even tending to suggest that the innkeeper or his employees solicited the strangers to sign the register. There is no evidence tending to show that the bringing down of the register was not at the request of the strangers. There is no evidence tending to show that the inducement for the bringing down of the register was other than the expectation or realization of a tip by the head waiter. Such act on his part was an accommodation to the strangers, saving them the trouble of rising from their comfortable chairs and walking upstairs to the office. Attention and service of that character is ordinarily productive of the desired tip for which head waiters are always in a receptive mood.

And there was no attempt to prove *scienter* even by evidence of similar conduct in other instances. So far as appears and so far as the court can assume, this was the only instance where the register was ever taken out of the office.

With all conviction we assert that, under the fundamental principles of criminal law, there is no justification in the record for the assumption that the act of the head waiter in bringing the register down from the office was otherwise than *bona fides*. That this court should regard that fact as material, much less controlling, was a surprise to the writer

hereof, and was certainly not anticipated by counsel for the defendant who tried the case in the court below and apparently not by counsel for the prosecution in the court below. Had it been anticipated, it is fair to say that one side or the other would have filled out the hiatus in the evidence and this court would have been informed whether the tip was responsible or otherwise why the register was brought down from the office.

The object of the two policemen, after they found that they could not get the beer, evidently was to make a test case upon the question of what constituted a meal, and in the court below that was the issue, and the appellant's brief in this court was written with that understanding.

We feel justified, in view of the misapprehension by this court of the motives of the defendant's employees, in stating that the writer is informed that, as a matter of fact, it was brought out at the trial that when the head waiter informed the strangers that liquor was served only to *bona fide* registered guests with their meals or in their rooms, the strangers stated that they desired to register and order food and asked for the register. As stated, the writer hereof did not handle the case in the Police Court and did not prepare the bill of exceptions. It is apparent, however, that, as we have suggested, whether or not a sandwich constituted a meal, was regarded as the issue, and the fact of bringing down the register was inserted merely as showing that the strangers registered. And the fact that the presiding justice signed the bill of exceptions without having included therein the evidence as to the statement by the strangers that they desired to register and order food and their request for the register, evidences that he also did not regard those facts as material to the issue.

We appreciate that this court can act only on the evidence set forth in the bill of exceptions, but the suggestion here made as to omitted evidence, demonstrates the wisdom of the presumption in favor of innocence and emphasizes the

point that the assumption by this court that the defendant's employees were engaged in a device to evade the law is unwarranted.

It will be observed that not until the strangers signed the register did they indicate what food they desired to order, and there is no evidence that the employees of the hotel made any suggestion to the two strangers beyond the exact statement of the law of which the strangers were assumed to be ignorant.

The ruling of this court amounts to a declaration that it must be assumed that there was an understanding between the strangers and the innkeper's employees, that the signing of the register should be a mere perfunctory act, *yet one of the strangers signed as of Cleveland, Ohio,* a point which this court does not notice, but which carries the plain sequence that the policemen were still representing themselves as strangers desiring entertainment, and repels any assumption of an understanding with the employees of the hotel. Why register as of a distant city if the signing of the register were an understood perfunctory act?

As we have said, the hotel was dealing with the strangers upon the assumption that they honestly desired entertainment to which they were entitled, and the defendant is entitled to every presumption of innocence.

The signing of the register was the establishment of the relation of host and guest, and that the primary request for beer and the signing of the register in the café had no effect upon the subsequent dealings of the parties is apparent upon a moment's reflection. Suppose, for instance, the two guests had thereupon ordered a turkey dinner. Would the duty of the innkeeper to serve them liquor with it be questioned? If not then the previous request for beer and the manner of signing the register were immaterial.

In Commonwealth *vs.* Regan, *supra,* the court below had instructed the jury "that if a man ordered a turkey dinner still he would not be a guest resorting to the hotel for food

within the meaning of the statute if his object in going there was to get the liquor and his ordering the food a mere means of obtaining it." This instruction was overruled by the appellate court, which, as pointed out in appellant's brief, approved requests for instructions substantially to the effect that if a person seemingly in good faith orders food for which he is to pay and expects to pay, the innholder lawfully may serve him intoxicating liquor with it if that also is ordered.

Would the innkeeper here have been justified in refusing, or even have been expected to refuse to serve a turkey dinner to these two strangers merely because they had first requested to be served with beer? Had he done so he would have subjected himself to liability for damages.

If in such a case the strangers would have been regarded as *bona fide* guests, and they be held not to have been *bona fide* guests in the present case because they ordered a sandwich, then the test is not what happened before they gave their order, but what they ordered. They became guests, however, when they registered, and the question is then to be decided. The court must forget that the two strangers were policemen seeking to lead the innkeeper into a violation of the law. It must put itself in the place of the innkeeper, who is, as it were, under a reciprocal liability, a civil liability, if he refuses entertainment to one entitled to it, and a criminal liability (extending into forfeiture of his property—the liquor license) if, in his endeavor to avoid a breach of his civil duty, he be led into a violation of the liquor law by designing spies. Suppose he refuses to receive two strangers as guests, a previous request to be served with beer would not avail him as a defense. And suppose he did receive them as guests and they, signifying their desire to be served with food, are presented with the bill of fare and order a sandwich and a bottle of beer, could he properly refuse to serve the beer? Would he be a judge of the quantity of food proper to satisfy the desire of the person? If he

could not refuse the beer when they ordered a turkey dinner, could he refuse the beer because a single sandwich satisfies the desires of the person? And it will be observed that the sandwich served was not the scant sandwich of the lunch-room, but the regular hotel a la carté sandwich, which in itself is a substantial meal.

Can there be the anomaly of a guest entitled to entertainment to the extent of food but not to liquor? Are two strangers to be branded with the commandment "thou shalt not" because through ignorance of the law they first ask for drink?

If a man enter a café or European dining-room and order a bottle of beer, does it follow that he does not desire or intend to order food? It is not uncommon for physicians to recommend to patients a bottle of beer before meals. In fact, the writer of this brief has received such advice from his family physician and acted on it. Would he be branded with the commandment "thou shalt not" if, in following medical advice, he entered a café and ordered a bottle of beer as preliminary to ordering a meal? He might be surprised at the information that liquor was served only to registered guests with their meals, but he would be astonished if his preliminary request for beer resulted in his being ejected from the premises. The explanation of the provision of the liquor law would naturally lead to an assertion of his desire for food as well as drink, and right there is the point where it is apparent that this court has overlooked the fundamental principles of presumptions in criminal law.

The fair inference is that the two strangers in the present case at once explained their ignorance of the law and their desire to become guests of the hotel and be served with food. Upon such explanation being made the innkeeper would have been bound to receive them. The signing of the register, far from being an act in violation of the law, was strictly in compliance with it.

In the final resolution the conviction in the present case

is not for violation of the law, but, in fact, for compliance with it.

As we have pointed out, so far as appears, there was no suggestion or even intimation as to what amount of food the strangers intended to order, until after they had registered and the bill of fare was presented to them. If they were entitled to order food at all, they were entitled to order what they pleased, and, as must be admitted, if a single sandwich satisfies the desires of the person, it constitutes a meal. Upon this point the court admits the declaration of the law in *Re* Cullinan, 87 N. Y. Supp., 660.

The statement in the opinion that the facts under consideration in Commonwealth *vs.* Regan and in *Re* Cullinan were different from those in the case at bar suggests that this court has failed to observe that in Commonwealth *vs.* Regan Mr. Justice Holmes states that it was not necessary to consider whether there was any evidence of a purchase of liquor with a mere illusory purchase of food, *because the evidence was not reported with a view to that question,* so that the facts in that case and in the present case cannot be compared.

In the Cullinan case the appellate court affirmed the conviction in the trial court upon the ground that the pretended sale of food was a mere simulation, and the language quoted in appellant's brief herein was used in distinguishing such a case from a legitimate transaction.

The substance of that quotation is a declaration of the fundamental principle that the innkeeper, in the absence of knowledge to the contrary, has the right to assume that one who orders food does so because he desires the nourishment which it affords.

This court quotes a note in 23 C. Y. C., at page 182, wherein the writer, in stating the rule as to a sandwich being used merely as a device, has unfairly stated the principle of the cases cited, which are the line of New York cases ending with the Cullinan case which was cited by the appellant. An examination of those cases will develop that

in every one the sandwich was what has gotten to be known as the proverbial Raines Law sandwich. The true distinction is made in the Cullinan case, which is the controlling case upon the subject in New York. We again request the court to carefully consider the cases of Cullinan *vs.* O'Connor and *Re* Cullinan, cited in appellant's brief.

The foregoing has been hastily prepared to meet the exigency presented by the mandate of this court having gone down at once upon the rendition of the decision, and that it will be executed on the 23d instant unless this court shall enter an order recalling it for the purpose of considering this petition.

Being of the strongest conviction that this court has erred in its affirmance of the ruling of the court below, and that this court should not condemn the defendant upon the present record, but return the case to the court below for a new trial, wherein the views of this court as to the evidential effect of the signing of the register in the café may be applied, we respectfully but most earnestly pray that this court grant a rehearing of the case and for that purpose recall the mandate.

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